



The Law Society

The Law Society's response to the Legal Services Board's (LSB) consultation on appeal arrangements for Alternative Business Structures (ABS).

Introduction

1. The Law Society welcomes the opportunity to respond to the LSB consultation on proposed arrangements for ABS appeals against decisions of Licensing Authorities.
2. The Law Society's detailed response to the questions posed by the LSB is set out in the Annex to this document. This section highlights the overarching principles which inform the Society's response.

The Fundamental Concern

3. The Law Society's fundamental concern is that the LSB's proposals are inconsistent with the principle of equal treatment between ABS and other law firms. That principle of equal treatment was regarded as essential by all parties during Parliamentary discussion on the Legal Services Act. The Law Society has made it clear throughout that its support for ABS, and its willingness to regulate them through SRA, depends upon maintaining that principle. It cannot be right for an issue concerning the fitness to practice of an individual in an SRA-regulated firm to go to the SDT if the individual works in an ordinary law firm, but to the regulatory chamber if he or she works in an ABS.

LSB's assumption that its proposals were supported.

4. The LSB included a small section on the proposal that ABS appeals should be heard by the General Regulatory Chamber (GRC) in the consultation paper published in November 2009.
5. The current consultation paper states in the executive summary: "The proposal received broad support from consultees." This statement, which is used to justify pursuing a single tribunal for ABS, ignores the fact that the Law Society, SRA and SDT all objected to the proposals. The LSB's analytical methodology seems to be flawed as their conclusion ignores the fact that all of the groups who are most affected by this proposal were opposed to it.

The Importance of Equal Treatment

6. The Society's response when the question was raised in the earlier ABS consultation was based on the 'level-playing field' principle. For ABS to provide the same public and consumer protections as other law firms they need to be regulated in the same way as other firms. Having two separate appeal routes for firms regulated by the same regulator potentially undermines consistency and fairness within regulatory systems. The LSB's

proposal wrongly places consistency among ABS, whoever licenses them, above consistency between the firms regulated by a particular regulator.

7. The SDT, in their response to the LSB consultation, indicated a willingness to hear ABS appeals.

“Given appropriate resources, the SDT considers that it has the ability, infrastructure, experience and expertise to conduct the appellate work referred to in this consultation paper. The expansion of work currently carried out by the SDT would result in a substantial saving of public expense over any other option.”

8. The LSB impact assessment does not give serious consideration to the option of each licensing authority having its own appeals body, as is the case now. It states:

“while the SDT clearly has significant expertise in relation to regulatory decisions about the conduct of individual solicitors, as a conduct only body which considers cases against individuals, it does not have expertise in considering cases against entire entities, particularly in the complex issues of ownership which may arise in relation to ABS.”

9. The Society believes that this substantially overstates the problem. In any event, it would be preferable to assist SDT to develop any necessary entity expertise rather than establishing an alternative tribunal.

Duplication of effort and inconsistencies

10. One of the LSB's arguments is that a single ABS appeal mechanism will create consistent decision making across all ABS, no matter which regulatory regime they were regulated by. This is misguided. Different licensing authorities will to some extent impose different requirements on the firms they regulate – but those requirements are likely to be the same for ABS firms and for other firms a particular licensing authority regulates. It is far more important to ensure that all firms regulated by a particular regulator are dealt with in the same way, than to ensure that ABS firms regulated by different licensing authorities are dealt with in the same way.
11. Parliament's intention was not that all ABS should be regulated under the same system, otherwise the Act would have implemented a single regulatory system for such organisations. Instead, Parliament specifically provided for the functions of SDT (and the Conveyancing Appeals Tribunal) to be amended so as to enable them to hear appeals from ABS.

Having a proportionate regulatory system

12. The Better Regulation Principles, encourage regulators to “think small first”. Regulators should only create new institutions when they are necessary and appropriate to the risk posed. If a regulator wants to bring in an alternative system, they should first demonstrate that it will bring improved cost effectiveness. Creating a new appeals process which runs parallel to an existing process is not a sensible approach.
13. The LSB's argument that their proposals will enable economies of scale does not apply to the solicitors' regulatory system. A fully operational SDT will

continue to exist - and need funding – even if all ABS appeals go to a separate body. The best way of achieving economies of scale would be to have appeals from all SRA regulated firms go through the SDT.

Having a single tribunal for ABS specific issues

14. In disciplinary and conduct matters SRA's response was similar to the Society's. They said that in view of the

“... overriding need for consistency between traditional firms and ABS, we propose a continuation of the existing disciplinary tribunals until all such matters can be transferred to a single body.”
15. The SRA were however favourable towards a compromise solution of creating a single tribunal to only hear appeals of a licensing and administrative nature specific to ABS, such as licensing appeals, fitness to own and fitness to hold particular posts.
16. The LSB express doubt about this proposal because they believe that it would cause confusion about what matters would be dealt with by each body and introduce the need for additional processes to decide which body should hear a particular type of appeal. We do not think that concern is well founded. The question of the appropriate route for the appeal would depend on the nature of the decision.
17. From the Society's perspective the suggested compromise is unnecessary because the SDT could easily incorporate the expertise to deal with such matters. But we do recognise that the approach proposed by SRA – under which issues specific to ABS firms were dealt with by a separate body – is acceptable in principle.

Having a single Legal Disciplinary Tribunal for all law firms

18. There is a valid argument for considering the establishment of a single disciplinary tribunal, to hear all legal service appeals. The proposed model for the medical profession, in which there is a single tribunal whose composition may vary according to the background of the medical professional against whom proceedings are being brought, may be worth examining
19. The LSB themselves have publicly stated their support for a single disciplinary scheme:

“On balance our preferred position is a single unified body to hear all legal service appeals. However, this may present too large a change prior to the implementation of the ABS regime and would require more through investigation. As an intermediate position we propose that a single appellate body is established to hear ABS related appeals on decisions made by LAs.”
20. It is wrong to conclude that because there is not the time to create a single unified body before the implementation of the ABS regime, an ABS specific body should be established as an interim measure, given the strong arguments of principle against that approach.

21. The Law Society has yet to form a concluded view on having a single legal disciplinary tribunal, but we recognise that there are no strong arguments of principle against it.

Conclusion

22. The Society is opposed to the approach proposed in the consultation.
23. The LSB's proposal contradicts one of the main principles underpinning the legislative provisions on ABS, by establishing different regulatory provision for ABS and for other law firms respectively. Issues arising about firms regulated by SRA – whether ABS or ordinary law firms - should continue to be dealt with by the SDT, which we believe can readily be adapted to deal with the challenges the new legal regulatory regime will bring.

**Law Society responses to questions contained in the LSB consultation
‘Alternative business structures: appeal arrangements’**

Question 1

Do you have any comments on the draft proposed recommendation to the Lord Chancellor at Annex B?

The draft states that the recommendation is made with the consent of the Law Society. We recognise that the Law Society (through SRA) is technically responsible for the decisions from which appeals are to be made, but the recommendation (if LSB persists with it) is strongly opposed by the Law Society itself, even if SRA should consent to it.

Question 2

Do you agree with the list of decisions which should be appealable to an appellate body and that this list should be based on decisions that affect a person’s civil rights? Do you agree that licensing rules should require that appellants seek internal review before an appeal can be made to the Tribunal? Do you have any comments on the draft supplementary guidance at Annex D?

The Society view is that in principle all decisions having an impact on an ABS (or other) firm should be appealable. We do however object to appeals from firms regulated by the SRA going to different bodies depending on the business model the firm chooses to adopt. The guidance rightly states in paragraph two that legal entities should make appropriate provision for appeals to the relevant appellate body against decisions made by LAs. For all firms regulated by the SRA the relevant appellate body should always be the SDT.

We agree that it is best practice for LAs to include in their licensing rules that appellants should seek internal review before an appeal can be made to the relevant tribunal. It should be for each LA to decide how best to meet this principle.

Question 3

Do you agree that there should be a general right of appeal available whenever an individual or ABS entity is aggrieved by a decision of a licensing authority that is appealable under the relevant licensing rules?

We agree.

Question 4

Do you agree with the proposed powers of the Tribunal in relation to matters appealable under the licensing rules?

We agree. The same powers should be available to SDT in respect of appeals from SRA regulated firms.

Question 5

Do you have any comments on the proposed membership of the pool from which panels will be selected, or on the proposed composition of panels?

Although the GRC is a well respected institution that contains many experienced members, we are unsure as to why the consultation assumes members of the gambling and claims management services jurisdictions will have relevant experience. The section in the consultation on membership and composition of panels is very brief and does not provide any evidence as to the relevance of the GRC's current expertise.

In principle the Society believes that there should be an element of peer review in proceedings such as these, and so every panel should contain a qualified lawyer. The composition of the panel could vary according to the background of the regulator against whom proceedings are being brought.

Question 6

Do the existing GRC Rules require any particular additions in order to accommodate ABS appeals? Please be specific about what is required and why it is needed.

We have no particular suggestions.

Question 7

Are there any of the current GRC Rules that need amending in order to accommodate ABS appeals? Please be specific about why the amendment is necessary.

We have no particular suggestions.

Question 8

Do you agree that the First-tier Tribunal should not have any power to award costs in proceedings relating to ABS appeals, beyond the existing powers of the GRC in relation to unreasonable behaviour or wasted costs?

The SDT has the power to award costs. We think that principal is important. The costs of dealing with unsuccessful appeals should be borne by the appellants, rather than by the regulated community as a whole.

Question 9

Do you agree that onward appeals from decisions of the First-tier Tribunal in relation to ABS appeals should be to the Upper Tribunal rather than the High Court for those bodies named in the Order?

These appeals essentially concern regulation of law firms. We think it would be preferable for onward appeals to lie to the High Court rather than to the Upper Tribunal.

Question 10

Do you have any comments on the draft order at Annex E to be made under s.80?

The Law Society is opposed to the draft order, because it does not support appeals from ABS against Licensing Authorities being heard by a single tribunal for the reasons mentioned in the covering letter.

Question 11

Do you agree that the cost of the appeal arrangements should be borne by licensing authorities and recovered as part of the licence fees on ABS? Do you have any comments on the proposed approach to apportioning the costs between licensing authorities?

We agree that in so far as they are not met by unsuccessful appellant, the costs of the appeal arrangements should be borne by the individual LAs. We do not agree with the proposed basis of apportionment between LAs. We believe costs should be apportioned according to the share of costs attributable to appeals from each licensing authority, offset by costs recovered in those cases.

Question 12

Do you agree with our proposal about the time period for appeals? Do you have any comments on the draft rules at Annex F?

The Society agrees that there should be a time period for appeals which is clearly communicated and fair. It is up to each LA to decide – after consultation – what this timetable should be. In principle we believe the timetable should be same for all SRA regulated legal entities, whatever the business model they choose to operate under.

Question 13

Do you have any comments on the draft impact assessment?

The draft impact assessment contained useful information about the costs involved in the running and setting up of the proposed system. The information provided shows that there is a minimal cost difference between maintaining the current system and the imposition of a single tribunal. In our view, costs to the Law Society would be likely to be greater if appeals went to a new tribunal, rather than the SDT.